IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G)

CIVIL WRIT JURISDICTION

CIVIL WRIT PETITION NO.3556 OF 2003

IN THE MATTER OF:

Railtech Schlatter Systems
Having its registered office at:
119, Avenue Louis Roche –
BP 152 92231
Gennevilliers Cedex,
France
Through its Power of Attorney and
Collaborator,
Mr. M. Cyril Pidoux ... *Petitioner*

V E R S U S

1. Bhilai Steel Plant,
Admn. Block,
Bhilai - 490001
District Durgh,
Chhattisgarh
Through its Managing Director,
Mr. B.K. Singh

2. Deputy General Manager (Project-EPS),
Admn. Block,
Bhilai Steel Plant,
Bhilai
District Durgh,
Chhattisgarh

3. Steel Authority of India,
Having its head office at:
spat Bhawan,
Lodi Road,
New Delhi – 110003
Through its Chairman

P. R. No. 3447/03
Presented by Shri Pankaj Tapadia
dated 31/10/03

4. M/s. Mechelonic Engineering Pvt. Ltd.,
Having its head office at:
C-230, SOLARIS-1,
Sakivihar Road,
Powai,
Mumbai – 400072
Through its Chairman/
Managing Director ... *Contesting* **Respondents**

AND IN THE MATTER OF:

A Writ Petition under Article 226 of the Constitution of India for issue of a writ of certiorari or an appropriate writ, order or direction in the nature of certiorari for calling of the relevant record pertaining to the Tender being Tender No. IFB No.CE(TK)/5(338)A/2003/437 dated 29.03.2003 for Package A and IFB No.CE(TK)/5(338)B/2003/438 dated 31.03.2003 for Package B

AND

for issue of an appropriate writ, order or direction for quashing and setting aside the Letter of Intent issued in August, 2003 by the Respondent No.1 in favour of Respondent No.4 above-named and any other further contract / documents executed in its favour as the same have been done illegally contrary to the terms of the Tender.

AND

for issue of a writ of mandamus or an appropriate writ, order or direction in the nature of mandamus directing Respondent Nos.1-3 to issue Letter of Intent in favour of the Petitioner-Company and thereafter to execute all necessary documents including the contract etc. in respect of Tender being Tender No. IFB No.CE(TK)/5(338)A/2003/437 dated 29.03.2003 for Package A and IFB No.CE(TK)/5(338)B/2003/438 dated 31.03.2003 for Package B

AND IN THE MATTER OF:

Article 14 of the Constitution of India

AFR

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WRIT PETITION NO.3556/03

Railtech Schlatter Systems

Vs.

Bhilai Steel Plant & Ors.

O R D E R

Post for: 12/4/2004.

Sd/-
Fakhruddin
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P.No.3556/2003

Railtech Schlatter Systems

Vs

Bhilai Steel Plant and Others

Shri Rajeev Datta, Sr. Advocate with Shri R.S. Jaiswal, Advocate for the petitioner.
Shri Vijay Hansaria, Sr. Advocate with Shri P. Diwaker, Advocate for respondents No.1 to 3.
Shri Ravindra Shrivastava, Sr. Advocate with Shri Manindra Shrivasta, Adocate for respondent No.4.

O R D E R

Per Fakhruddin, J.

The petitioner has filed this petition for issuance of a writ of certiorari or an appropriate writ, order or direction in the nature of certiorari calling for the records pertaining to the tender being tender No.CE(TK)/5(338)A/2003/437 dated 29.03.2003 for package A and IFB No. CE(TK)/5(338)B/ 2003/438 dated 31.03.2003 for package B issued by respondents No.1 to 3. The petitioner has further prayed for issuance of an appropriate writ, order or direction for quashing and setting aside the letter of intent issued in August, 2003 by respondent No.1 in favour of respondent No.4 and any other further contract / documents executed in its favour as according to the petitioner they have been done illegally, contrary to the terms of the tender. The petitioner

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has also prayed for the issuance of a writ of mandamus or an appropriate writ, order or direction in the nature of mandamus directing respondents No.1 to 3 to issue letter of intent in favour of the petitioner company and thereafter to execute all necessary documents including the contract etc. in respect of the tender.

2. The facts in brief are that the petitioner is the company duly registered under the laws of the Republic of France and is inter alia engaged in the business of manufacture and selling of various types of welding equipments including rail welding plants. It is contended that they are the world's foremost manufacturers and integrators of welding plants with a very wide experience in manufacturing and supplying Rail Flash Butt Welding Machines along with other finishing equipments to various countries all over the world in the past. It is stated that they are presently engaged in executing orders of same machines to M/s. Jindal Steel & Power in India. It is further contended that the petitioner company is constrained to file this petition as the respondents No.1 and 2 have illegally and acting in an arbitrary fashion decided to issue letter of intent to respondent No.4 company and to award a contract for packages A and B contrary to the tender conditions contained in documents IFB No.CE(TK)/5(338)A/2003/437 dated 29.03.2003 for package A and IFB No. CE(TK)/5(338)B/ 2003/438 dated 31.03.2003

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for package B. It is contended that above act is contrary to law and is violative of Article 14 of the Constitution of India. It is also arbitrary exercise of powers on the part of respondents No.1 to 3, who are Government of India functionaries / enterprises falling within the purview of State within the meaning of Article 12 of Constitution.

3. The petitioner has formulated the questions of law for consideration, which are as under:

> *"a. Whether once the Government has decided to award contract on the basis of bid of tender it must abide by the terms of the Tender and whether not following strictly the Tender conditions tantamount to infringement of Article 14 of the Constitution?*
>
> *b. Whether in the facts of the present case the act of the respondents No.1 to 3 of issuing letter of intent and awarding of the contract to respondent No.4 in respect of tender being tender No.CE(TK)/5(338)A/2003/437 dated 29.03.2003 for package A (Rail Welding Machine) and IFB No. CE(TK)/5(338)B/ 2003/438 dated 31.03.2003 for package B (Finishing Machines and conveyors) is amenable to the scope of judicial review on the grounds of mala fides, unreasonableness and arbitrariness?"*

4. Shri Rajeev Datta, learned Senior Counsel for the petitioner contends that in the year 2002, the respondents No.1 and 2 issued an invitation for installation of a world-class rail welding plant at Rail and Structural Mill to meet the demand of the Indian Railways for 240-260 meter long rails for safer and high-speed travel. It is contended that the petitioner company had purchased the tender documents.

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After purchasing the same, the petitioners submitted their offer on 14/8/2002. The petitioner was the only qualified bidder but unfortunately after detailed technical and commercial negotiations respondents cancelled the tender vide their letter dated 31/3/2003. It is submitted that no reason was assigned for cancellation. It is further submitted that respondents no.1 and 2 again issued a global tender for the purchase of complete rail welding plant and rail structural mill but by splitting the initial complete line into three parts:

(i) Package 'A' – Installation of rail welding machine;
(ii) Package 'B' – Installation of equipment for rail welding plant, viz. Roller tables, Transfer bed, Brushing station, Grinding station, Hydraulic Press, Cooling stations, Ultrasonic flaw detector, Saws, Bend test machine, etc.;
(iii) Package 'C' – Installation of rail welding plant-Rail handing system.

5. Counsel for the petitioner contended that though the petitioner had purchased all the three tender documents, but quoted only in respect of package A and package B. It is submitted that two invitations for bid were sent by respondents No.1 to 3 on 29.03.2003 and 31.03.2003 to the petitioners. The respondents No.1 to 3 had enclosed the bid data sheet. Copy of the same has been filed as Annexure P-1 collectively. It is contended that in the tender documents and

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the invitations for bid sent to the petitioner, the respondents No.1 to 3 had also included bio data sheet for package A under ITB 8.3 (c) which mentions criteria for eligibility of the bidder as follows:

(i) The principal bidder should have supplied and commissioned successfully at least 5 (five) nos. of automatic flash butt rail welding machine in the last 5 (five) years.

(ii) The average annual turnover for the last 3 years of the principal bidder should be Rs.4.00 crores (approximately).

6. It is contended that similarly in the bid data sheet for package B under ITB 8.3 (c), the criteria for eligibility mentions as under:

(i) The average annual turnover for the last 3 years of the principal bidder should be Rs.5.00 crores (approximately).

7. Counsel for the petitioner further contended that the requirement was that the principal bidder or his associate had supplied and commissioned successfully rail welding plant. It is contended that this was mandatory and had an overriding effect on other provisions in the IFB and ITB. It is further contended that respondents No.1 to 3 had invited the respondent No.4 for the technical and commercial meetings along with the petitioners, though the respondent No.4 did

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not fulfill the criteria of principal bidder as given in tender advertisement and tender documents.

8. Learned counsel contended that respondent No.4 did not fulfill the criteria of principal bidder as regarding successful manufacturer of atleast 5 rail flash butt welding machines in the last five years specified in the tender documents. Regarding package B, respondent No.4 again did not qualify in terms of individual turn over of the principal bidder nor did they ever build and set into operation a similar state-of-the-art line for high-speed track as specified by respondents No.1 to 3 in their technical specifications. Counsel referred to the letters Annexure P-2 dated 16.06.2003, Annexure P-3 dated 10.07.2003 and Annexure P-4 dated 15.07.2003 written to the Member (Engineering), Railway Board, Ministry of Railways, Govt. of India. On 22.07.2003, the petitioner sent a letter (Annexure P-5) to respondent No.3. It is contended that since the petitioners did not receive any reply, they sent the representation (Annexure P-6) to the Hon'ble Minister for Steel, Govt. of India.

9. Counsel for the petitioner submitted that the respondents No.1 to 3 have failed to apply the eligibility criteria as set out in the tender documents to respondent No.4. It is submitted that they have completely over looked the conditions and deviated. In para 9 (s) of the petition, it is

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contended that respondents No.1 to 3 have taken certain guarantees from respondent No.4 and their associates i.e. M/s. Giesmar France and M/s. Techno Fab, Calcutta. It is further contended that respondents No.1 to 3 called for submission of revised price bids from the petitioners and respondent No.4 on 07.07.2003. It is also contended that the price bid by respondent No.4 at this time had both imported contents in Euros and local supply. It is contended that in reading out of price bids to representatives of the bidder, it was noticed that respondent No.4 had put nearly 40 per cent of machine cost under foreign design and engineering in both packages A and B thereby trying to take advantage of lesser duty levy in terms of respondents bid evaluation, clause ITB 38.2 (e), which indicates a R&D cess of only 5 per cent as against 25 per cent basic Custom Duty on machine CIF value. It is further contended that this would give advantage to respondent No.4. It is also contended that respondent No.4's machines were not of proven design as their design cost was so high. It is contended that in both conditions the respondents No.1 to 3 ought to have rejected the offer of respondent No.4 as they wanted only proven machines. It is further contended that the petitioners finally sought a meeting with the Director (Projects), Steel Authority of India Ltd. and Chairman, Steel Authority of India Ltd. on 22.09.2003 but they were only able to meet the Chairman,

who did not provide the petitioner with any satisfactory answer.

10. Counsel submits that a letter of intent has been issued to respondent No.4 and the respondents No.1 to 3 are in process for signing the contract for package A and package B with respondent No.4 and his associates. As such, having no alternative remedy, the petitioners filed the present petition on the ground that conditions of tender are not being strictly followed and it is violative of Article 14 of the Constitution of India. It is contended that the decision making process is liable for judicial scrutiny on the grounds of mala fides, unreasonableness and arbitrariness.

11. In support of the questions formulated, Shri Rajeev Datta, learned Sr. Counsel contended that the fair play is required even in administrative action and he relying upon the judgment of the Apex Court in the case of Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. reported in 1979(3) SCC 489, contended that the administrative authority is equally bound by the norms, standards and procedures laid down by it for others. Disregard of the norms or standards would invalidate its action unless it is based on some valid principle, which is neither irrational or unreasonable nor discriminatory.

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Learned counsel referred to paragraphs 6, 7, 10, 20, 21 and 34 of the judgment.

12. Learned counsel further relied upon the judgment of the Apex Court in the case of Ram and Shyam vs. State of Haryana reported in 1985(3) SCC 267 and contended that the Government has a right not to accept the highest bid and even to prefer a tender other than highest bidder, if there exists good and sufficient reasons, such as, the highest bid not representing the market price or need to give the concession to a weaker section of the society who could not outbid the highest bidder. But after rejecting the offer it is obligatory on the Government to act fairly and at any rate it cannot act arbitrarily. Learned counsel referred to paragraphs 11, 12 and 14 of the judgment.

13. Learned counsel for the petitioner also relied upon the judgment of the Apex Court in the case of Kumari Shrilekha Vidyarthi & Ors. vs. State of U.P. & Ors. reported in 1991 (1) SCC 212 and contended that State's action is amenable to judicial review to determine violation of Article 14 irrespective of the scope of review in this sphere. Learned counsel referred to paras 19, 22 and 24 of the judgment.

14. Learned counsel for the petitioner further relied upon the judgment of the Apex Court in the case of G.B. Mahajan vs. Jalgaon Municipal Council & Ors. reported in 1991 (3)

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SCC 91 and contended that for judicial review relating to contractual transaction of Government, public law element must be present before judicial review can be invoked. He referred to paragraph 46 of the judgment.

15. Learned counsel for the petitioner also relied upon the judgment of the Apex Court in the case of Tata Cellular vs. Union of India reported in 1994 (6) SCC 651 and contended that only the decision making process and not the merits of the decision itself is reviewable as a Court does not sit as an appellate Court while exercising power of review. While the Court cannot interfere with Government's freedom of contract, invitation of Tender and refusal of any tender which pertain to policy matter, but whether the decision / action is vitiated by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury's unreasonableness', i.e., when the decision is such as no reasonable person on proper application of mind could take or procedural impropriety, can be looked into by Court. Test is whether wrong is of such a nature as to require intervention. If so, Court would set right the decision making process but it would not substitute its own opinion for that of experts. The principal of judicial review would apply to exercise of contractual powers of Government bodies in order to prevent arbitrariness or favoritism. He referred to paragraphs 70, 76 and 80 of the judgment.

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16. Learned counsel for the petitioner further relied upon the judgment of the Apex Court in the case of Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation & Ors. reported in 2000 (5) SCC 287 and contended that the Court's interference is called for where Government action is arbitrary or discriminatory. Notice inviting tender for appointment of agents for collection of octroi subject to terms and conditions stated therein; one of the conditions of eligibility deleted after the expiry of the time limit for submission of tenders but before opening thereof. In such circumstances, award of the contract to a tenderer who at the time of submission of tender did not satisfy the state condition rightly set aside by the High Court as arbitrary. He referred to paragraphs 11, 12 and 14 of the judgment.

17. Learned counsel for the petitioner also relied upon the judgment of the Apex Court in the case of W.B. State Electricity Board vs. Patel Engineering Co. Ltd. & Ors. reported in 2001 (2) SCC 451. He made reference to Placitum A, B and E of the said judgment.

18. Learned counsel for the petitioner further relied upon the judgment of the Apex Court in the case of Datta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd. & Ors. reported in 1997 (1) SCC 53. He referred to paragraph 7 of the judgment.

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19. Shri Vijay Hansaria, learned Sr. Counsel for respondents No.1 to 3 on the other hand contended that no procedural impropriety or irrationality is there so as to invoke extra ordinary writ jurisdiction. It is submitted that the Court's enquiry is limited to the decision making process of the concerned authorities. It is stated that respondents No.1 to 3 awarded the contract to the consortium of respondent No.4, which was admittedly the lowest tenderer. It is contended that the petitioner wants to challenge the award of contract on merits on certain disputed questions of fact, which cannot be adjudicated upon in the writ petition. The writ petition is barred by the principle of delay. The tenders were opened on 07.05.2003. Though the petitioners had raised objections against the eligibility of respondent No.4 by their representation dated 16.06.2003, but the same was rejected. It is submitted that both the petitioner and consortium of respondent No.4 submitted their revised bids, which were open on 07.07.2003 in presence of both the parties without any objection by the petitioner as to the eligibility of respondent No.4. The letter of intent was issued in favour of respondent No.4 on 21.08.2003 and formal contract was signed with the consortium of respondent No.4 on 21.09.2003. All these facts were fully known to the petitioner.

20. Counsel also contended that the petition is barred by the principal of estoppel and acquiescence inasmuch as the petitioner has fully participated in the process of award of the contract in which both the petitioner and consortium of respondent No.4 were considered. The petitioner having participated in the tender proceedings along with respondent No.4 is estopped from challenging the eligibility of the respondent No.4.

21. Counsel for respondents No.1 to 3 submitted that the paper publication was issued on 5/8.6.2002. The respondents reserved their right to cancel the tender at any time without assigning any reason. Clause 42.1 of the Instructions to Bidders was referred. Counsel contended that after due deliberations, the Committee decided to retender the rail welding plant package by splitting into suitable sub packages. The work of laying down of the technical specification for each of the sub packages was entrusted to Center for Engineering & Technology (CET).

22. Shri Hansaria submitted that as per clause 8.3 of the Instructions to Bidders, a bid can be submitted by consortium of two or more parties as members. So far as qualification is concerned, it was specifically provided that in order for a consortium to qualify, each of its members or combination of members must meet the minimum criteria

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listed for an individual bidder. Clause 1.4 of the general conditions of contract defined contractor to include one or more members of the consortium. According to clause 3.9.1, where the contractor is a consortium, all the parties are bound severally and jointly to the employer to fulfill the contract.

23. Counsel submitted that the petitioner and respondent No.4 both requested for tender documents, which were made available to them. The tenders were submitted by only two parties i.e. petitioner and consortium comprising of respondent No.4, M/s. L. Geismar, France and M/s. Siemens Ltd., Mumbai, who joined later, for project A and for project B consortium comprising of respondent No.4, M/s. L. Geismar, France, M/s. Techno Fab Manufacturing (P) Ltd., Kolkata and M/s. Siemens Ltd., Mumbai, who joined later. He referred to forwarding letter of respondent No.4 dated 02.05.2003 with regard to package A as well forwarding letter of respondent No.4 dated 02.05.2003 with regard to package B.

24. Counsel further submitted that along with the bid documents, the respondent No.4 attached MoU between the consortium members. Counsel contended that respondent No.4 meets the eligibility criteria. One of the consortium members of respondent No.4 namely M/s. L. Geismar has supplied and commissioned successfully five automatic flash

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butt rail welding machines in the last three years, whereas the requirement is to have done this in the previous five years. With regard to requirement of average annual turnover for the last three years, it is submitted that the respondent No.4 alone has an average turnover of about Rs.6.00 crores.

25. Learned counsel submitted that there are only four parties available globally, who are the manufacturers / suppliers of modern rail welding machine including the petitioner and M/s. Geismar, France, the consortium member of respondent No.4. The Committee considered that M/s. Geismar, France, the consortium member of respondent No.4 meets the eligibility criteria of supplying 5 machines in last five years. More over, out of the four manufacturers world over, one is presently not in the business and the other has not submitted the bid and in case the offer of respondent No.4 was not considered then (a) the respondent No.1 would have left with only one party i.e. petitioner which might have lead to earlier situation existed before the re-tendering; (b) it would have been very difficult to get reduction in the price and finalize the tender with single party; and (c) there would have been no competition and the objective of getting competitive price by re-tendering might have not been achieved and at that stage, the following adverse implications would have arisen:

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(i) The whole process of global bidding, techno-commercial scrutiny / discussions etc. being lengthy and time consuming it would further delay the overall commissioning schedule of rail welding plant which in turn would have lead to considerable cost overrun.

(ii) The other package suppliers of rail welding plant might also ask compensation for delay in commissioning of their packages.

(iii) Since parties were limited in the field possibility of poor response could not be avoided by repeated re-tendering.

26. Learned counsel further submitted that the price bid evaluation report was submitted to the tender committee and the tender of the respondent No.4 was accepted for project A and project B. On 21.08.2003, letters of intent for project A and project B were issued and on 21.09.2003, formal contracts for both projects were duly signed and executed between respondent No.3 and consortium members of respondent No.4.

27. Counsel also submitted that after signing of the above contracts, many meetings have taken place for proper implementation of projects. Performance bank guarantee has already been submitted by all consortium members in accordance with the terms of contract.

28. Shri Hansaria submitted that respondent No.4 had submitted bid for package A on its behalf and also on behalf

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of its consortium member M/s. L. Geismar, France. The bid for package B was submitted by respondent No.4 on its behalf and on behalf of its consortium members M/s. L. Geismar, France and M/s. TFM Ltd., Kolkata.

29. Shri Hansaria referred to para 10 of the petition and contended that the petitioners have not come with clean hands. In para 10 of the petition, the petitioners have stated that they have learnt that respondents no.1-3 issued a letter of intent around 20th August, 2003 to respondent no.4 and are in the process of signing a contract for package A and package B with respondent no.4 and its associates. Learned counsel referred to prayer clauses (b) and (c) of the main petition.

30. Learned counsel contended that there is no whisper in the entire petition for cancellation of the contract and it is just mentioned in the ad-interim stay application in prayer (a). It is submitted that this is misleading the Court. They made the prayer in the stay application and no such prayer at all is in the writ petition. Learned counsel contended that there is delay in filing the petition. It is submitted that the tenders were opened on 07.05.2003; the petitioner raised the objection against the eligibility of respondent No.4 by its representation dated 16.06.2003, which was rejected; the petitioner and the consortium of respondent No.4 submitted their revised bids, which were opened on 07.07.2003 in presence of both the

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parties; the letter of intent was issued in favour of respondent No.4 on 21.08.2003 and formal contract was signed with the consortium of respondent No.4 on 21.09.2003. It is contended that these facts were fully known to the petitioner; yet the present petition has been filed on 01.11.2003 suppressing the above facts. It is submitted that the petition is belated and suffers from laches.

31. Learned counsel placed reliance upon the judgment of the Apex Court in the case of Tata Cellular vs. Union of India reported in 1994 (6) SCC 651. He referred to paragraphs 70, 71, 77, 81 and 94 of the said judgment.

32. Learned counsel further relied upon the judgment of the Apex Court in the case of Raunaq International vs. IVR Construction Ltd. reported in 1991(1) SCC 492. He referred to paragraphs 11 and 12 of the judgment.

33. Learned counsel for the respondents No.1 to 3 also relied upon the judgment of the Apex Court in the case of Air India Ltd. vs. Cochin International Airport Ltd. reported in 2000 (2) SCC 617. He referred to para 7 of the judgment.

34. Learned counsel submits that consortium is a group of companies that joint or associate in an enterprise. Learned counsel relied upon the judgment of Apex Court in the case of

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New Horizons Ltd. vs. Union of India reported in 1995(1) SCC 478. He referred to paragraph 23 of the judgment.

35. Learned counsel relied upon the judgment of the Apex Court in the case of Ramana Dayaram Shetty vs. International Airport Authority of India and others reported in AIR 1979 SC 1628. He referred to paragraph 34 of the judgment. Learned counsel further relied upon the judgment of the Apex Court in the case of G.B. Mahajan vs. Jalgaon Municipal Council & ors. reported in 1991(3) SCC 91. He referred to paragraph 46 of the judgment. Learned counsel also relied upon the judgment of the Apex Court in the case of State of Gujarat vs. Meghji reported in 1994(3) SCC 552. He referred to paragraph 22 of the judgment. Learned counsel further relied upon the judgment of the Apex Court in the case of Kerala State Elec. Board vs. Kurian) reported in 2000(6) SCC 293. He referred to paragraph 10 of the judgment. Learned counsel also relied upon the judgment of the Apex Court in the case of Continental Constructions vs. Tehri Hydro Development Corporation reported in 2002(8) SCC 177. He referred to paragraph 10 of the judgment.

36. Shri Ravindra Shrivastava, learned Sr. Counsel for the respondent no.4 stated that he supports the contentions raised by the respondents No.1 to 3. He further submitted that M/s L. Geismar, France is the consortium member of

respondent no.4 and the said consortium member of respondent no.4 had been supplying welding machines of Schlatter make for number of years for rail-joining application all over the world. The respondent no.4 submitted bid on its own behalf and on behalf of M/s L. Geismar, France in respect of package A and M/s L. Geismar, France & M/s Technofab Manufacturing Ltd. Kolkata in respect of package B. Learned counsel further laid stress on the point that the petitioner is guilty of *suppressio veri* and *suggestio falsi*. It is contended that in the entire petition challenge has been made by the petitioner to the eligibility condition qua package A by specifying terms and conditions and eligibility qualification in respect of package A contract only. It is stated that "A" is different than "B". Learned counsel laid much emphasis on the acquiescence, waiver and delay in approaching the Court.

37. Learned counsel contended that according to tender conditions, with particular reference to clause 8.3, in order that a consortium qualifies each of its members or combination of members must meet the entire criteria in accordance with ITB Clause-I, the component of the contract that they are designated to perform. It is also contended that if the contractor is a consortium of two or more parties, all such parties shall be jointly and severally bound to the employer for the fulfillment of the provisions of the contract

and shall designate one of such party to act as a leader with authority to bind the consortium.

38. Counsel also referred to the documents Annexures-R/4(4) and R/4(5) as portions of instructions to bidders and general terms & conditions of the contract. The contention is that in the cases of consortium bidding, each member of consortium is deemed to be a principal bidder. The bidder's eligibility and qualifications with regard to a consortium, therefore, would mean eligibility and qualification of combination of members as a whole. It is contended that respondent no.4 alongwith M/s L. Geismar, France in respect of package A meets the criteria for eligibility in respect of package A on each and every aspect. As far as package B is concerned, it is said that respondent no.4 meets the criteria for eligibility on each and every aspect. It is reiterated that one of the consortium members of the respondent no.4, namely, M/s L. Geismar, France had supplied and commissioned successfully five automatic flash butt-rail welding machines in the last three years as against the requirement of having done so in the previous five years.

39. Learned counsel contended that the arguments have been advanced without pleading. Shri Shrivastava referred to para 1 of the document Annexure-P/2, which reads as under:

> *"In terms of your letters, our Representatives and Associates for this business, M/s Advani*

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Oerlikon Limited have attended the Technical and Commercial meetings regarding our offer's for packages 'A' and 'B' at Bhilai, from 2/5/2003 to 6/6/2003. We hope we were able to help you achieve the objectives of this meeting in clarifying and answering questions raised in your letters."

40. Learned counsel further referred to paras 9(m),(n),(p),(q), (r) and (u) of the petition. He specifically referred to para 9(o) of the petition. Relevant portion of para 9(o) of the petition is quoted below:

> *"(o) ..... It was pointed out that respondent no.4 as the Principal Bidder and Consortium Leader and M/s Geismar-France only should have been rejected as it did not have requisite experience, reference and annual turnover and the petitioners for the first time were constrained to mention that one of the reasons for the tender being invited for the second time was only in order to favour respondent no.4. Since it was the first time that the Indian Railways and SAIL were going to decide for modern high technology of welded steels rails for high speed trains, it was necessary that they chose the world's best and most economical solutions as offered by the Bidder."*

It is pointed out that these averments go to show that the tender offered by the respondent no.4 was qua consortium and not by respondent no.4 alone.

41. Learned counsel referred to the document at pages 30 and 31 of the return submitted by respondent no.4, which is Sales References of L. Geismar. It is pointed out that the bidding was by consortium and it was submitted on

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2/5/2003 by consortium. It contains from pages 24 to 36. At this stage, he referred to para 9(m) of the petition to content that it was common knowledge and from the details noted from the tender opening. It was contended that if it was within the common knowledge, why the petitioner was waiting for such a long time. It is further contended that only after the cards were opened and the meetings on technical and commercial points were held on 7/7/2003, hue and cry has been raised. Learned counsel submitted that it was on 10/7/2003 that the petitioner came out with the objections when it was known on 7/7/2003 that the revised price offered by consortium of respondent no.4 was less than that of the petitioner. Learned counsel referred to the document at page 46. It is submitted that during the period from 7/5/2003 to 1/11/2003 the petitioner participated, allowed consortium of respondent, allowed meetings to take place, evaluation of commercial and technical was done, agreement had taken place on 21/9/2003, the bank guarantee of Rs.12.93 crores have been furnished for package A and for package B bank guarantee of Rs.18.73 crores have been furnished, letter of credit has been open, lay-out and drawing has been done, basic engineering has been done and he has acquiesed. It is contended that the petitioner is not entitled for relief on the ground of acquiescence and laches.

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42. Learned counsel relied upon the judgment of the Apex Court in the case of Maharashtra Road Transport Corporation vs. Balwant Regular Motor Service reported in AIR 1969 SC 329. He referred to para 15 of the judgment. It is contended that merely writing representations will not explain delay and will not absolve the acquiescense and waiver. Reliance has been placed upon the judgment of the Apex Court in the case of Jagdish Narayan Maltiar vs. State of Bihar reported in AIR 1973 SC 1343. He referred to para 8 of the judgment. Learned counsel further relied upon the judgment of the Apex Court in the case of Samanta and another vs. Bombay Stock Exchange reported in 2001(5) SCC 323. He referred to paragraph 9 of the judgment. Learned counsel also relied upon the judgment of the Apex Court in the case of Sunita Agrawal vs. State of Haryana reported in 2000(2) SCC 615. He referred to paragraph 4 of the judgment.

43. Learned counsel contended that some play in the joint is always available. For this he placed reliance upon the judgment of the Apex Court in the case of Rajbihari Panda vs. State of Orissa reported in AIR 1969 SC 1081. He referred to paragraph 17 of the judgment. Learned counsel further placed reliance upon the judgment of the Apex Court in the case of Hansraj Kehar vs. State of UP reported in AIR 1975 SC 389. He referred to paragraph 8 of the judgment. Learned counsel also relied upon the judgment of the Apex Court in

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the case of State of M.P. vs. Nandlal Jaiswal and others reported in AIR 1987 SC 251. Learned counsel further relied upon the judgment of the Apex Court in the case of New Horizons Ltd. vs. Union of India reported in AIR 1995(1) SCC 478. He referred to paragraphs 3,6,17,18,23 and 26 of the judgment. Learned counsel also relied upon the judgment of the Apex Court in the case of Raunaq International vs. IVR Construction Ltd. reported in 1991(1) SCC 492. He referred to paragraphs 8,9,10 and 11 of the judgment.

44 Learned counsel submitted that respondent No. 4 is an Indian company and has a right under Article 19(1)(g) of the Constitution of India to to carry on any occupation, trade or business. It is also submitted that the company owes a duty under Article 51A(j) of the Constitution which provides that it shall be the duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement.

45. By way of reply, Shri Rajeev Datta, learned counsel for the reiterated that the jurisdiction under Article 226 of the Constitution of India is available as there is violation of Article 14 of the Constitution. He submits that there is no acquiescence, waiver and latches and he has joined respondent no. 4 who is the proper party and represents others as well.

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46. The factual and legal submissions made at length by the learned counsel for the parties as far as possible have been referred hereinabove and they are being considered. The legal and factual submissions with reference to the questions formulated in the petition addressed by both sides have been discussed hereinabove.

47. The Apex Court in K. Vinod Kumar vs. S. Palanisamy & Ors. [2003(10) SCC 681] has held that over proceedings and decisions taken in administrative matters, the scope of judicial review is confined to the decision making process and does not extend to the merits of the decision taken. It is well settled that only the decision making process and not merits of the decision itself is reviewable as Court does not sit as Appellate Court while exercising power of review – Decision/Action when open to review. The test is to the effect that while Court cannot interfere with Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter and whether the decision / action is vitiated by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury unreasonableness' i.e. when decision is such as no reasonable person or proper application of mind could take or procedural impropriety can be looked into by Court. Further test is that whether wrong is of such a nature as to require intervention. It is well settled that Court would not substitute its own opinion for that of the experts.

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In Tata Celullar (supra), it has been further held that mere power to choose cannot be termed arbitrary. As held and argued that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of power of judicial review. Government is the guardian of finances of the State. It is expected to protect financial interest of the State. The right to refuse the lowest or any other tender is always available to the government. But the principles laid down in Article 14 of the Constitution of India have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14, if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

48. The Apex Court in Tata Cellular (supra) lays down five conditions. This Court is required to see whether those conditions are fulfilled or not. It is no doubt true that it is

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open to the Court to review the decision maker's evaluation of the facts. The Court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

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49. It has been further held by the Apex Court that the judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations; one is the ambit of judicial intervention and the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

50. It has been further held in the case of Tata Cellular (supra) that the duty of the Court is thus to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

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3. Committed a breach of the rules of natural justice,

4. Reached a decision which no reasonable tribunal would have reached or,

5. Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. An administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is much that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

(iii) Procedural impropriety.

51. The Apex Court in the case of Indian Railway Construction Company Ltd. vs. Ajay Kumar, reported in 2003 (4) SCC 579, has considered the principles of judicial review in administration action in paragraphs 13, 14, 15 and 16 and has dealt with the relevant principles formulated by the Courts broadly. The Hon'ble Apex Court has referred to the

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passage from judgment of Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. (K.B. p. 230 : All ER p. 683 F-G). It reads as follows:

> *"..... It must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."*

Para 18 of the judgement in Indian Railway (supra) is also relevant and quoted below:-

> *"18. Therefore, to arrive at a decision on "reasonableness" the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bonafide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view."*

Para 20 of the judgement in Indian Railway (supra) is also relevant and quoted below:-

> *"20. In other words, to characterize a decision of the administrator as "irrational" the court has to hold, on material, that it is a decision " outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future."*

52. The Apex Court in the case of Raunaq International Ltd. (supra) has held as under:

> *"This is not a case where any mala fides have been alleged against any members of the Board. Nor is there any allegation of any collateral motive for*

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awarding the contract to the appellant. The only ground of challenge was that the appellant did not fulfill the qualifying criterion."

53. The Apex Court in the case of New Horizons Ltd. (supra) has laid emphasis to the effect that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The action of the State in the matter of award of a contract has to satisfy this criterion. The discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. But however, recognized that certain measure of 'free play in the joints' is necessary for an administrative body functioning in an administrative sphere.

54. The Apex Court in aforesaid case has further held as under:

"Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22.04.1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualize a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past

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experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganization as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganized company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganized company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganized company which does not have experience in its name. Conversely there may be a split in a company and person looking after a particular field of the business of the company form a persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by

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the name of the company but by the persons behind the company."

55. It is well settled that Government or its instrumentalities have policy options to adopt any method or technique for management of the project provided the same is within the constitutional and legal limits. The judicial review is not open in such matters. Government or its instrumentality is free to evolve any method for execution of a project. The judicial review is not open so long the method is within the constitutional and legal limits. Regarding contractual transaction of Government, public law element must be present before judicial review can be invoked.

56. The Apex Court in the case of G.B. Mahajan (supra) has held as under:

"..... With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against time scales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority. We might recall

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the memorable words of what Justice Brandeis said:

'The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation...'

'...There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs...'

'To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment..... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.'

'The courts are kept out of the lush field of administrative policy, except when policy is inconsistent with the express or implied provisions of a statute which creates the power to which the policy relates or when a decision made in purported exercise of a power is such that a repository of the power, acting reasonably and in good faith, could not have made it. In the latter case, 'something overwhelming' must appear before the court will intervene. That is, and ought to be, a difficult onus for an applicant to discharge. The courts are not very good at formulating or evaluating policy. Sometimes when the courts have intervened on policy grounds, the court's view of the range of policies open under the statute or of what is unreasonably policy has not won public acceptance. On the contrary, curial views of policy have been subjected to stringent criticism. In the world of politics, the court's opinions on policy are naturally less likely to reflect the popular view that the policies of a democratically elected government or of expert administrators....'

'The considerations by reference to which the reasonableness of a policy may be determined are rarely judicially manageable....'

'As Professor Wade points out, ample room, within the legal boundaries for radical differences of opinion in which neither side is unreasonable. In

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Tameside case (Secretary of State for Education and Science v. Metropolitan Borough of Tameside, 1977 AC1014: (1966) 3 All ER 665) Lord Denning pointed out the error of confusing differences of opinion, however strong, with unreasonableness on the part of one side or the other. Lord Diplock said that the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

57. In this connection, it is useful to refer Administrative Law, Eighth Edition, H.W.R. Wade & C.F. Forsyth (Page 776 para 2), wherein Prof. Wade has dealt with as under:

"Contractual obligations are not enforceable by judicial review,(see above, p. 624) unless the question is whether the contracting authority has exceeded its powers. So much of the territory of government is now administered through contracts that this exclusionary rule may allow wide regions of administrative power to escape from judicial control, contrary to constitutional principles.(See [1994] PL 86, [1998] PL 288 (M. Freedland); Murry Hunt in Taggart (ed.), The Province of Administrative Law, 21). It does not yet seem that the courts are alive to this danger."

58. Prof. Wade at page 776 para 3 has further dealt with as under:

"In practice, as opposed to law, there are many special aspects of public authorities contracts which, though interpreted and enforced according to the ordinary law, may be regarded as the subject of a distinct body of rules.(see Turpin (as above), chs. 6-8). Rates of profit on central government contracts are subject to review, either upwards or downwards, and either generally or for particular contracts, by the Review Board for government contracts."

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59. Prof. Wade at page 777 and 778 also dealt with as under:

> "Government by contract
>
> *Contracts are widely used by public authorities as instruments both of policy and of administration. (See Turpin, British Government and the Constitution, 4th edn., 404; Harden, The Contracting State; [1994] PL 86, [1998]pl288 (m. Freedland). Local authorities may make use of their statutory contract powers for ulterior purposes of policy. In the planning field, they have wide powers to enter into agreements for 'restricting or regulating' the development or use of land. (Town and Country Planning Act 1990, s. 106) They are often able to induce applicants for planning permission to agree to concessions, which they would have no power to impose by way of statutory conditions. The legality of this practice has been questioned but it has been held to be legitimate.(Good v. Epping Forest DC [1994] 1 WLR 376; Tesco Stores Ltd. v. Secretary of State for the Environment [1995]1 WLR 759 (HL). Administrative collaboration between local authorities and other public bodies may be arranged by contract, so that one may perform services on behalf of another under statutory powers.(Local Government Act 1972, s. 101.*

60. Prof. Wade (page 778 para 3) has also dealt with as under:

> *"Government departments let many contracts by competitive tender, in accordance with a policy of testing the market wherever possible. (see,e.g., R.v. Lord Chancellor ex p. Hibbit and saunders [1993] COD 326 (above, p. 630). See generally Harlow and Rawlings, Law and Administration, 2nd edn., chs 12014; Arrowsmith, The Law of Public and Utilities Procurement, ch. 13) Local authorities have been compelled to do the same, so that*

their own works departments may be exposed to commercial competition. Services such as ground maintenance, refuse collection and vehicle maintenance are examples, which have been subjected to 'compulsory competitive tendering'. Successive Local Government Acts empowered the Secretary of State to extend the list and to give directions to recalcitrant authorities which might be 'banning orders' restricting or regulating their powers. (Local Government Planning and Land Act 1980, Pt. III; Local Government Act 1988, Pts. I, II (now partly repealed). Local Government Act 1992, Pt. I. See Secretary of State for the Environment ex p. Haringey LBC (1994) 92 LGR 538 (Secretary of State's banning order upheld) This draconian regime was relaxed in 1999 in a change of policy, which imposed a duty to secure 'best value (Local Government Act 1999 (above,p. 125).'.

61. It is worthwhile to mention here that Prof. Wade in 8th Edition of his book- Administrative Law, after analysing the position has stated that English law, unlike that of France and other countries, has no special legal regime governing contracts made by public authorities. Formerly the Crown had a special legal position, and to some extent it still has; but, as explained by Prof. Wade as reproduced hereinabove under the head "liability in contract", it has for most practical purposes been put into the same position as an ordinary litigant by the Crown Proceedings Act 1947. In England the Central government departments normally make contracts in their own names but as agents of the Crown, so that the enforcement of such contracts is governed by the Act. Other governmental bodies such as local authorities are subject to

the ordinary law of contract which applies to them in the same way as to private individuals and corporations (though with one important exception), as mentioned by Prof. Wade.

62. It is worthwhile to mention here that the Hon'ble Apex Court in case Kerala SEB (supra) has held that a contract would not become statutory simply because it is for construction of public utility and has been awarded by statutory body. The Apex Court held as under:

> *"We find that there is a merit in the first contention of Mr. Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature."*

In the opinion of this Court, the decision in Kerala SEB applies under the facts and circumstances of this case.

63. So far as the question regarding delay and laches is concerned, it is evident on record that there has been delay

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and laches on the part of the petitioner. On 07.05.2003 commercial bids were opened in presence of all the parties, however, the petitioner raised objection about the eligibility of respondent No.4 for the first time on 16.06.2003 i.e. after lapse of nearly 40 days for which no explanation has been offered. During this period admittedly the petitioner was attending the technical and commercial meetings with the respondents No.1 to 3. On 16.06.2003 the petitioner for the first time made a representation to the respondents No.1 to 3 objecting about the eligibility of respondent No.4 and thereafter few more representations were made in the month of July, 2003. Again on 07.07.2003, both the parties submitted their revised price bids. The Apex Court in the case of Ramana Dayaram Shetty (supra) has held as under:

> *"It is difficult to understand why the appellant should have waited until November 8, 1977 to file the writ petition when the tender of respondents 4 was accepted as far back as April 19, 1977."*
>
> *"Moreover, the writ petition was filed by the appellant more than five months after the acceptance of the tender of respondents 4 and during this period, respondents 4 incurred considerable expenditure aggregating to about Rs.1,25,000/- in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most iniquitous to set aside the contracts of respondents 4 at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of respondents 4 but the appellant allowed a period of over five months to elapse during which respondents 4 altered their position. We are, therefore, of the view that this is not a fit case in which we should interfere and grant relief to the appellant in the exercise of our discretion under Article 226 of the Constitution."*

In view of above and under the facts and circumstances of this case, the petitioner did not approach promptly and delay has occurred in invoking the jurisdiction under Article 226 of the Constitution of India.

64. So far as joining of necessary parties is concerned, no justiciable ground has been pointed out by the petitioner for not joining the consortium members of respondent No.4. The Apex Court in the case of Ramrao vs. All India Backward Class Employees Association reported in 2004(2) SCC 76, has also held as under:

> *"Admittedly, the Union of India or NABARD were not parties in the said writ petitions. An order issued against a person without impleading him as a party and, thus, without giving him an opportunity of hearing must be held to be bad in law. The appellants herein, keeping in view the fact that by reason of the impugned direction, the orders of promotion effected in their favour had been directed to be withdrawn, indisputably, were necessary parties. In their absence, therefore, the writ petition could not have been effectively adjudicated upon."*

65. Counsel for the respondents 1 to 3 submitted that it has also come on record that respondent No.4 while submitting the tender specifically stated that the tender documents are being submitted on their own behalf and on behalf of M/s. L. Geismar and a MoU is executed between them. The tender document nowhere postulates furnishing of any consortium agreement in a particular format. There appears to be force in the contention. It is useful to refer the Blacks Law Dictionary

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(7th Edition) defines the "consortium" means "a group of companies that join or associate in an enterprise". Signing of MoU is a mode of executing an agreement. Respondents No.1 to 3 have reiterated that they have accepted the MoU. The contract has been awarded to the lowest bidder and the petitioner' bid is higher. The price difference is significant and the respondent no.4 qualifies according to the award criteria. The letter of intent has merged into tripartite agreement dated 21.09.2003 in which on one hand the Bhilai Steel Plant is the party and on the other hand the respondent no.4 and also the members of consortium L. Geismar & Siemens India are the parties. The petitioner has not joined them as party, as such the agreement and contract in their absence cannot be quashed. There is force in the contention that proper parties have not been joined.

66. During the course of arguments, emphasis also made was regarding the compared prices chart which has been submitted by the petitioner in written submission contending that the prices offered by respondent No.4 for the design and engineering are exorbitant and manipulated compared with the price of imported equipment quoted in this bid or on international market; in fact the design and engineering costs are 15 times higher than the petitioners' offer for package A and more than 40% higher for package B. The compared price chart is quoted below:

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"Compared prices

Package A

(i) *Design & Engineering: Petitioner=Euro 36,381/- plus Rs.19,75,867/- Respondent No.4=Euro 5,60,400/- plus Rs.1,23,95,715/-*

(ii) Plant & Equipment: Petitioner=Euro 16,02,608/- plus Rs.1,05,10,959/- Respondent No.4= Euro 8,40,600/- plus Rs.1,01,62,160/-

(iii) Total (incl. Trg. Ins. Etc.): Petitioner= Euro 17,24,942/- plus Rs.2,12,09,249/- Respondent No.4= Euro 15,05,600/- plus Rs.3,21,27,000/-

The total price in Rs. without duty taxes: The petitioner quoted Rs.11.43 crores whereas the respondent No.4 has quoted Rs.11.34 crores.

Similarly the total price for package B in Rs. without duties, taxes, etc. were, quoted by petitioner=Rs.20.61 crores whereas the respondent No.4=Rs.17.50 crores."

67. The questions regarding compared price chart have been vehemently disputed by the other side and categorical statement is that by accepting the offers of package A and package B, there is a saving of Rs. 6.48 crores. The saving of Rs. 6.48 Crores or so have been repeated at various hearings and reiterated at the bar. It was stated by Shri Hansaria, learned Senior counsel that saving of Rs. 6 crores or so may not matter with petitioner but it matters most with respondents No. 1 to 3 and they have arrived at this figure on opinion of Expert Body. There is nothing to doubt about this statement made by respondents. In any case, these questions

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cannot be gone into writ jurisdiction under Article 226/227 of the Constitution of India as they are disputed and it requires evidence including those of Experts.

68. The bids were opened on 07.05.2003. It is borne out that respondents No.1 to 3 were continuously negotiating with the petitioner with regard to technical as well as commercial aspects and this was to the knowledge of each other. The petitioner and the respondent No.4 participated in the process. The Bid Data Sheet is only one part of the entire bidding document and any clause of the contract has to be interpreted by taking into consideration the entire bidding documents and not a particular clause at a particular place. This Court is fortified with this on the observations made by the Apex Court in the case of Cochin International Airport Ltd. (supra) wherein it has been held as under:

> *"Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."*

69. This Court cannot lost sight of the fact that what is laid down in G.B.Mahajan's case (Supra) is that with the

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expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities, there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against time scales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matter of economic policy, which lack adjudicative disposition. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. Courts are kept out of the lush field of administrative policy, except when policy is inconsistent with the express or implied provisions of a statute which creates the power to which the policy relates or when a decision made in purported exercise of a power is such that a repository of the power, acting reasonably and in good faith, could not have made it. In the latter case, 'something overwhelming must appear before the court will intervene. That is, and ought to be, a difficult onus for an applicant to discharge. The courts are not very good at formulating or evaluating policy. Sometimes when the courts have intervened

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on policy grounds, the court's view of the range of policies open under the statute or of what is unreasonably policy has not won public acceptance.

70. The power under Article 226 of the Constitution is sought to be enforced in respect of acceptance of a tender by respondents no. 1 to 3 in favour of respondent No. 4. Respondents No. 1 to 3 have accepted the tender of respondent No. 4 and its consortium. Both the tenders were submitted and opened admittedly on 7-5-2003. Certain objections were raised by the petitioner as per Annexure P-1 on 16-6-2003. On 7-7-2003 the petitioner and respondent No. 4 both were called for negotiations, negotiations took place and each one of them submitted the revised price bids, which have been considered and it is after considering their offers that the position which has emerged is that in both project A and Project B, the quotations of respondent No. 4 are lower and there is saving of 6.48 crores rupees. The elements of public interest are there inasmuch as public money would be expended for the purpose of this project and the project is being commissioned for the public purpose as construction of the plant is done for Indian Railways and the same would be supplied to the India Railways. The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. The public would also be interested in the quality of the work

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undertaken or goods supplied by the tenderer. Public interest is also there in timely fulfillment of project as if any delay in project occurs it would be retardation of industrial development, hardship to the general public and substantial cost escalation.

71. Evaluation Committee of the experts was appointed to evaluate offers. Offers have been examined by the Expert Committee of respondents No. 1 to 3. By Court's intervention, the proposed project may be considerably delayed. This escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. The respondents have placed on record that this project though initially was one, but it was divided into three projects namely A, B and C. There was a detailed consideration of the need, viability, financing and cost-effectiveness of the proposed project.

72. The petitioner had participated in the price bid. His revised bid was also higher then he is raising grievance after his bid is admittedly higher. In the petition there are disputed questions. It is also relevant that the respondent no. 4 has submitted his consortium member. The committee considered that M/s. Geismar, France meets the eligibility criteria of supplying 5 machines in last five years. There are only four

parties available in the world, who are the manufactures/suppliers of modern rail welding machine including the petitioner and M/s. Geismar, France, the consortium member of respondent No. 4 is one of them. It is pertinent to note that the respondents No. 1 to 3, as stated in the application under Article 226 (3) of Constitution of India, in the return and reiterated at the Bar, have considered and compared all the pros and cons of the matter. They have written in the return as well as application under Article 226(3) on affidavit that they have examined the matter from all points. This is the case of the respondents that four parties are available globally, who are the manufacturers / suppliers of modern rail welding machine including the petitioner and M/s. Geismar, France, the consortium member of respondent No.4. According to the respondents 1 to 3, the Committee considered that M/s. Geismar, France, the consortium member of respondent No.4 meets the eligibility criteria of supplying 5 machines in last five years. More over, out of the four manufacturers world over, one is presently not in the business and the other has not submitted the bid and in case the offer of respondent No.4 was not considered then (a) the respondent No.1 would have left with only one party i.e. petitioner which might have lead to earlier situation existed before the re-tendering; (b) it would have been very difficult to get reduction in the price and finalize the tender with single

party; and (c) there would have been no competition and the objective of getting competitive price by re-tendering might have not been achieved. It is also stated by them that that by resorting to re-tendering at that stage, the following adverse implications would have arisen:

(i) The whole process of global bidding, techno-commercial scrutiny / discussions etc. being lengthy and time consuming it would further delay the overall commissioning schedule of rail welding plant which in turn would have lead to considerable cost overrun.

(ii) The other package suppliers of rail welding plant might also ask compensation for delay in commissioning of their packages.

(iii) Since parties were limited in the field possibility of poor response could not be avoided by repeated re-tendering.

These are the reasons which were within the realm of consideration of respondents No. 1 to 3 and they have been considered by them. Therefore, all aspects have been considered by the committee. The petitioners have also met the Chairman. They have raised the objection on 16-6-2003 which were also considered and rejected. The petitioner and respondent No. 4 submitted their revised bid on 7-7-2003 which was opened on that very day. Letter of intent has been issued on 21-8-2003 and contract has been signed. This petition has been filed on 1-11-2003. Everything has been

done after considering all aspects of the matter and due deliberation. Nothing has been done in hot haste. Once the respondent No. 4 was held eligible and qualified and the objection of petitioner was rejected, the petition ought to have immediately approached the Court instead of taking part in the tender proceedings, on the contrary they submitted revised price bid.

73. Counsel for respondents has submitted that the petition is barred by the principle of Acquiescence and Waiver. The principle underlying the doctrine of acquiescence is that the omission on the part of the petitioner to assert his right, has caused prejudice to the adverse party. Some of cases where the doctrine of acquiescence has been applied are Maharashtra State Road Transport Corporation –v- Balwant Regular Motor Services (AIR 1969 SC 329), Ajit Singh –v- State of Punjab (AIR 1967 SC 856), Pannalal Binjraj –v- Union of India (AIR 1957 SC 397). Suneeta Aggarwal –v- State of Haryana (2000(2) SCC 615) was a case where the appellant was selected to the post of lecturer but the Vice-Chancellor disapproved the selection and directed the post to be re-advertised. After re-advertisement the appellant again applied for the same post and appeared before the Selection Committee for interview without any protest. On the same day she challenged the order of Vice-Chancellor disapproving her selection by way of a writ petition. The High Court refused to

grant her any discretionary relief. The said judgement was confirmed by the Hon'ble Apex Court. In Maharashtra State Road Transport Corporation (supra), it has been observed that in general, a person who submits to the jurisdiction of an inferior tribunal and takes part in the proceedings without objection on the ground that the tribunal has no jurisdiction, cannot, after having failed in these proceedings, turn round and question the jurisdiction of that tribunal, in a petition under Article 226 of the Constitution. Here in the case in hand, the petitioner and respondent no. 4 submitted their tenders on 7-5-2003 and the Technical and Commercial Evaluation Committee submitted its recommendations holding petitioner and respondent No. 4 as qualified for packages A and B. The petitioner raised objections and they were rejected. Thereafter the petitioner submitted its revised price bids on 7-7-2003. The petitioner was acquiescenced in participation of respondent no. 4 at all stages of deliberations and meeting in the matter of finalization of tender. It is only after the letter of intent was issued on 21-8-2003 and the contract duly signed, the petitioner has challenged the eligibility of respondent no. 4. Therefore the acquiescence is there.

74. The principle of waiver has been considered in Krishanlal –v- State of J & K (1994(4) SCC 422) and it has been laid down that where the object of the provision is only the protection or benefit of a particular individual (as

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distinguished from that of the public), it can be waived by the individual, so that if the facts constituting such waiver is proved the petition under Article 226 may be dismissed.

75. So far as judicial review is concerned, the Court's inquiry is limited to the decision making process of the concerned authorities. Admittedly the consortium of respondent no. 4 was the lowest tenderer. In view of the decision of the Apex Court as discussed and referred to hereinabove including Tata Celullar (Supra), it has been held by the Apex Court that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible. The terms of the invitation to tender cannot be opened to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. In the instant case, decisions have been made qualitatively by Committee of experts. Respondents No. 1 to 3 like any other government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an

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administrative sphere or quasi-administrative sphere. This Court has considered the entire matter as discussed hereinabove in great details and is of the opinion that it does not suffer from arbitrariness, bias or actuated by mala fide.

76. In view of the facts and circumstances of the case discussed hereinabove, it is not a fit case for interference under Article 226/227 of the Constitution of India. It is however open to the petitioner to file a suit and if such a suit is filed, it shall be decided on its own merits in accordance with law without being influenced by any of the observations. Accordingly this petition stands disposed of.

77. Before parting, this Court appreciates the valuable assistance rendered by the learned counsel appearing for the parties.

Sd/-
Fakhruddin
Judge

12/04/2004

Hande
Pathak